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No. 73

Supreme Court of the United States

OCTOBER TERM, 1950

PHILLIPS PETROLEUM COMPANY,
a corporation,
Appellant,

VERSUS

THE STATE OF OKLAHOMA, ET AL.,
Appellees.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
Motion	1
Statement	2
Brief and Argument	3
Conclusion	10

AUTHORITIES

CASES CITED:

Aetna Insurance Co. v. Hyde, 275 U. S. 440	10
Bellport v. Harrison, 123 Kans. 310, 255 Pac. 52	7
Brown-Forman Co. v. Kentucky, 217 U. S. 563	9
Board of Trade of City of Chicago v. Olsen, 262 U. S. 1	10
Columbus & G. Ry. Co. v. Miller, 283 U. S. 96	9
Commissioner of Internal Revenue v. Affiliated Interprises (10 C. C. A.), 123 Fed. (2d) 665, 668	8
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	9
Denio v. City of Huntington Beach, 22 Cal. (2d) 580, 140 Pac. (2d) 392, 400, 491	8
Elsinore Oil Co. v. Signal Oil & Gas Co., 3 Cal. App. (2d) 570, 40 Pac. (2d) 523	8
First National Bank v. Louisiana Tax Commission, 289 U. S. 60	10
Frank L. Young Co. v. McNeill-Edwards Co., 283 U. S. 398	9
George Moore Ice Cream Co. v. Rose, 289 U. S. 373	9
Gorieb v. Fox, 274 U. S. 603	10
Hazeltine Corp. v. Zenith Radio Corp. (C. C. A.), 100 Fed. (2d) 10, 16	8

INDEX CONTINUED

PAGE

Hinkle v. Gauntt, 201 Okla. 437, 206 Pac. (2d) 1001, 1003 8

Kissick v. Bolton, 134 Iowa 650, 112 N. W. 95 7

Lynch v. United States, 292 U. S. 571 10

Massachusetts v. Mellon, 262 U. S. 447 9

McEntire's Adm'r v. Bond, 227 Ky. 607, 13 S. W. (2d) 772 8

Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226 10

Rathbun v. Williams, 154 Kans. 600, 121 Pac. (2d) 243, 245 8

Red River Valley National Bank v. Craig, 181 U. S. 548 9

Rindge Co. v. Los Angeles, 262 U. S. 700 9

Roberts & Shaefer Co. v. Emmerson, 271 U. S. 50 10

Robinson v. Milam, 124 W. Va. 218, 24 S. E. (2d) 236, 240 8

Serena v. Rubin, 146 Kans. 603, 72 Pac. (2d) 995, 998 7

United Gas Public Service Co. v. Barrett (La. App.), 179 So. 506, 510 7

Utah Power & Light Co. v. Pfost, 286 U. S. 165 10

Wilner v. United States, id. 10

STATUTES:

Title 52, Okla. Stat. 1941, Sec. 241 2

MISCELLANEOUS:

Okla. Const., Art. IX, Sec. 18 2

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MOTION

Appellees, the State of Oklahoma, the Corporation Commission of Oklahoma, the Commissioners of the Land Office, and Peerless Oil and Gas Company, move to dismiss the appeal herein, and for cause say:

That the record does not show that appellant, Phillips Petroleum Company, is or will be injured or affected by the orders of the Corporation Commission numbered 19514 and 19515, and it therefore has no standing to question the correctness of the decision of the Oklahoma Supreme Court holding said orders constitutional and valid and refusing to vacate or annul them.

STATEMENT

The proceeding was instituted before the Corporation Commission on October 12, 1945, by Peerless Oil & Gas Company against Cities Service Gas Company, to require the latter to take gas ratably from Peerless' wells in the Guymon-Hugoton field in Texas County, Oklahoma, at a price and basis of measurement to be prescribed by the Commission. The application also prayed a general order fixing the price to be paid by all purchasers of natural gas in that field (R. 31).

Art. IX, Sec. 18, Okla. Const., provides that, before any order shall be made against any company by name, it shall be given at least 10 days' notice of the time and place when and where the contemplated action will be considered and determined, and that before any general order, not directed against any company by name but having general application, shall be made, notice shall be given by publication not less than once a week for four consecutive weeks in a newspaper published in the capital city; and Title 52, Sec. 241, Okla. Stat. 1941, makes substantially the same provision.

In this case personal notice was served upon Cities, and, as respects the general order prayed for, notice was published in Oklahoma City and also in Texas County, in which the gas field is located, and proof of publication was duly made (R. 40, 41). Later the State on relation of the Commissioners of the Land Office intervened, alleging that it owned large tracts of land producing gas in that field, and praying a general order fixing the price of gas therein at 10 cents per MCF (R. 171). Upon that application, on

June 19, 1946, the Commission again gave notice to all companies operating or taking gas in that field, including appellant by name (R. 174); and, on June 25, 1946, it gave notice to all such operators, purchasers and takers of the setting of the cause for hearing (R. 176).

Appellant made no appearance at any time during the hearing of those applications. The hearing resulted, on December 9, 1946, in the making of orders No. 19514 (R. 11) and 19515 (R. 19), to become effective on January 1, 1947.

On January 17, 1947, appellant filed an application with the Commission to vacate and set aside the orders (R. 809). Notwithstanding it made no averment and offered no proof of a want of knowledge of the applications and the hearings thereon, the Commission heard its application, found that its operations and the price it was receiving for its gas in that field were not violative of the orders and that it was not injured or affected by them, and it made an order denying the application (R. 853). From that order appellant appealed to the State Supreme Court, which affirmed the order.

BRIEF AND ARGUMENT

Phillips buys no gas in the Hugoton field in Oklahoma (R. 830). It transports its own gas from its leases in that field to its gasoline extraction plant in Hansford County, Texas, there extracts from it the gasoline (R. 827-30), butane, propane, butadiene and other valuable hydrocarbons (R. 842-43), and sells the residue to Panhandle Eastern Pipe Line Company under a twenty-year contract dated April 5, 1943 (R. 861), at a price of 4.67

cents per MCF during the first five years of the contract (R. 833 and 844) increased by ½ cent per MCF at the end of each five years (R. 880). The hydrocarbons taken from the gas are utilized and sold at a profit (R. 849). It recovers six-tenths of a gallon of liquid from each thousand cubic feet treated, totaling from 78 to 80 thousand gallons daily, of which 46 or 47 thousand gallons are gasoline and the remainder is propane, butane, and butadiene (R. 842-43). The gasoline sells for from 5 to 5½ cents per gallon and the other products at more than 2 cents per gallon (R. 849).

Appellant appeals only as to Order No. 19514, which is a general order, and as to that portion of Order No. 19515 which has general application. The challenged provision of each is as follows:

> "That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price at the wellhead of less than 7 cents per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch."

In its application (R. 809) it alleged that it owns leases and is a substantial producer of gas in that field, but is neither a common carrier nor a common purchaser of gas therein. Its application was conditioned upon whether the orders were "intended to apply to applicant in the situation described above" (par. 6, subd. [e] and [f]); and it prayed that the Commission set aside so much of the orders as "applies to applicant", or that it "make an order amending, modifying and supplementing said order, ex-

cluding from its terms and provisions the production of gas not sold in its natural state, or where not sold at the well, and clarifying said orders in their application to the production of gas not so sold."

After a hearing the Commission found that Phillips "is now realizing from the natural gas produced in the Guymon-Hugoton Field the equivalent of 7 cents per M cu. feet at the wellhead within the terms and meaning of Orders 19514 and 19515"; "that said orders were meant to prohibit the production of natural gas from the producing formations in said field unless same was sold at a price of 7 cents per thousand cubic feet on the measurement basis provided for in said orders, if same were sold, but if not sold, that said gas should be so utilized and/or sold that the producer would realize therefrom the equivalent of 7 cents per thousand cubic feet at the wellhead and on the pressure basis provided for in Orders 19514 and 19515; that the applicant, Phillips Petroleum Company, is realizing from the utilization and sale of natural gas produced by it in the Guymon-Hugoton Field the equivalent of 7 cents per thousand cubic feet at the wellhead on the pressure basis of measurement provided for in said orders for all natural gas produced by it in the Guymon-Hugoton Field; therefore in that respect applicant is already complying with Orders Nos. 19514 and 19515"; "that applicant herein, Phillips Petroleum Company, is not injured by the application of a 7 cents price for all gas produced by it in the Hugoton Field since it is presently realizing approximately that amount at this time" (R. 853; 855-56).

The Commission thus clarified the orders "in their application to the production of gas not sold" at the well-head and in their application to appellant, as prayed; and held that the orders did not forbid the utilization of the gas that appellant was making, that its operations were not in violation thereof, and that the orders permitted it to carry on its operations as theretofore, without let or hindrance. It expressly held that appellant was not injured by the orders.

The orders thus clarified and interpreted give appellant no ground of complaint. Its operations are not affected by them.

The only possible basis for a claim of injury to appellant is that the effect of the orders is to increase its royalty obligation to its lessors or royalty owners. But that contention cannot be successfully made for two reasons. One is that appellant laid no basis for such a contention and never made it below and has not made it here; and the second is that the orders do not have that effect.

That contention was not made in appellant's application to the Commission to vacate the orders or in its petition in error in the Supreme Court. And it has not been made here. It was not the subject of a decision by either the Commission or the Court. In neither appellant's application nor in its petition in error did it mention its royalty owners or its royalty obligations. It introduced none of its leases in evidence, nor did it introduce any evidence as to their terms and provisions, other than the fact that some of its witnesses testified that it paid its royalty owners 1/8th

of the 4.67 cents per MCF which it received for the gas from Panhandle Eastern.

There are any number of forms of leases. Some of them provide that the lessee will deliver to the lessor ⅛th of the gas in kind, with the option on the lessee's part to purchase the same at the market price. Others make no provision for delivering any of the gas to the lessor but provide that the lessee will pay the lessor ⅛th of the price for which the lessee sells the gas. And still others provide for a fixed cash sum per annum for each gas well.

Under the first form of lease, if the lessee exercises its option to purchase the lessor's share of the gas, it could possibly be held to be purchasing gas at the wellhead. Under the second form, the lessee owns all the gas, and the ⅛th of the price received for it which it pays to the lessor as royalty is a consideration for the lease and not the price of gas purchased from the lessor. It is analogous to a farm rental. In such case, and also under the third form, the lessee in and by his lease purchases the right to go upon and drill the land and produce and appropriate all the gas, and the sums payable to the lessor thereunder constitute the consideration agreed upon for that right, and is not a purchase of gas after its production.

—*Serena* v. *Rubin*, 146 Kans. 603, 72 Pac. (2d) 995, 998;

Bellport v. *Harrison*, 123 Kans. 310, 255 Pac. 52;

Kissick v. *Bolton*, 134 Iowa 650, 112 N. W. 95;

United Gas Public Service Co. v. *Barrett*, (La. App.), 179 So. 506, 510;

McEntire's Adm'r v. *Bond*, 227 Ky. 607, 13 S. W. (2d) 772;

Elsinore Oil Co. v. *Signal Oil & Gas Co.*, 3 Cal. App. (2d) 570, 40 Pac. (2d) 523;

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Hazeltine Corp. v. *Zenith Radio Corp.*, (C. C. A.), 100 Fed. (2d) 10, 16;

Commissioner of Internal Revenue v. *Affiliated Interprises* (10 C. C. A.), 123 Fed. (2d) 665, 668;

Hinkle v. *Gauntt*, 201 Okla. 437, 206 Pac. (2d) 1001, 1003;

Robinson v. *Milam*, 124 W. Va. 218, 24 S. E. (2d) 236, 240;

Rathbun v. *Williams*, 154 Kans. 600, 121 Pac. (2d) 243, 245.

This Court, however, can not take judicial knowledge of those various forms of leases. If it could, still it cannot judicially know which form of lease appellant has. And there are an infinite number of variations in the consideration clauses of gas leases.

Appellant, therefore, laid no basis for such a contention.

Moreover, the orders do not purport to change the terms and provisions of the gas leases, or to increase the lessee's obligation to its royalty owners. That that is true as to appellant is shown by the Commission's finding that its operations are in conformity with the provision of the

orders and that it is no. injured. The purpose of the orders is to prevent waste, physical and economic, and to protect the correlative rights of lessees and producers. If in any case its effect should be to increase the amount payable to a royalty owner, that would be only incidental and the result of the contract between him and his lessee. Many gas leases provide for the payment as royalty of a fixed sum per well per annum, and in such event the order would not affect the royalty owner either directly or indirectly.

It is uniformly held that a party can question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage; otherwise, he has no litigable interest in the question.

—*Massachusetts* v. *Mellon*, 262 U. S. 447;

Rindge Co. v. *Los Angeles*, 262 U. S. 700;

Brown-Forman Co. v. *Kentucky*, 217 U. S. 563;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;

Red River Valley National Bank v. *Craig*, 184 U. S. 548.

The constitutionality of a statute or of an administrative order made pursuant thereto cannot be questioned by a party whose rights are not affected by it.

—*George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373;

Frank L. Young Co. v. *McNeill-Edwards Co.*, 283 U. S. 398;

Columbus & G. Ry. Co. v. *Miller*, 283 U. S. 96;

Utah Power & Light Co. v. *Pfost*, 286 U. S. 165;

Roberts & Shaefer Co. v. *Emmerson*, 271 U. S. 50;

First National Bank v. *Louisiana Tax Commission*, 289 U. S. 60;

Gorieb v. *Fox*, 274 U. S. 603.

A person attacking a state statute as violating the constitution must show that the alleged unconstitutional feature injures him (*Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226).

One whose rights under a war risk policy in a certain form are not disturbed by subsequent legislation affecting its terms, cannot complain thereof (*Lynch* v. *United States*, 292 U. S. 571; *Wilner* v. *United States*, id.).

The constitutionality of the Grain Futures Act giving a commission power to exclude from all contract markets persons violating the provisions of the act or attempting to manipulate market prices, will not be determined in a suit for injunction where the plaintiff does not aver that he is committing acts subjecting him to such exclusion, or that charges have been made and proceedings begun against him, or that proceedings are about to be begun (*Board of Trade of City of Chicago* v. *Olsen*, 262 U. S. 1).

An insurance company receiving just compensation under a statute, cannot attack its constitutionality because competitors could not make reasonable profit (*Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440).

There are many other authorities to the same effect, but the foregoing are sufficient. What appellant seeks

from this Court is, not the determination of an existing controversy between it and the appellees affecting its rights adversely, but a declaratory judgment with respect to a situation that has not arisen and may never arise.

It is submitted that the appeal should be dismissed.

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